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No. 98-2056

In the Supreme Court of the United States

ABDELHAMID BELLI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board of Immigration Appeals' denial of asylum and withholding of deportation to petitioner, who fears punishment for his failure to comply with his government's recall to military service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 177 F.3d 979 (Table). The decision and order of the Board of Immigration Appeals (Pet. App. 5-8) and the decision and order of the immigration judge (Pet. App. 9-14) are unreported.

JURISDICTION

The court of appeals entered its judgment on March 25, 1999. The petition for a writ of certiorari was filed on June 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 *et seq.*, as amended by the Refugee

Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, provides that an alien will be considered a "refugee" if he "is unable or unwilling to return to" his home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A) (1994). If the "Attorney General determines" that an alien qualifies as a refugee, the Attorney General may grant that person asylum in the United States, 8 U.S.C. 1158(a) (1994). An alien claiming eligibility for asylum need only demonstrate a reasonable fear or risk of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-441 (1987). The alien bears the burden of proving that he is a refugee because he has the requisite well-founded fear of persecution. 8 C.F.R. 208.13(a). Once an alien has established his eligibility for asylum, the decision whether to grant or deny asylum falls within "the discretion of the Attorney General." 8 U.S.C. 1158(a).[1]

In addition, "if the Attorney General determines" that an alien's "life or freedom would be threatened" in the country of deportation "on account of race, religion,

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[1] Section 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. VI, Subtit. A, 110 Stat. 3009-690, significantly revised the INA's asylum provision. That amendment, however, does not govern the present case because it applies to applications for asylum filed on or after April 1, 1997. IIRIRA § 604(c), 110 Stat. 3009-694. The changes in asylum worked by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV, Subtit. C, § 421(a), 110 Stat. 1270, do apply to this case because the AEDPA amendment governs asylum determinations made on or after the amendment's effective date of April 24, 1996. AEDPA § 421(b), 110 Stat. 1270. The AEDPA amendment, however, is not pertinent to petitioner's claim.

nationality, membership in a particular social group, or political opinion," the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1) (1994). To be entitled to relief under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (applicant bears the burden of proof of eligibility for withholding of deportation). If the alien makes such a showing, withholding of deportation is mandatory. 8 U.S.C. 1253(h)(1).[2]

2. Petitioner is a native and citizen of Algeria. Pet. App. 9. Petitioner served in the Algerian military from 1987 to 1989. *Id.* at 11. From 1991 to 1995, petitioner worked for the Algerian government in the Ministry of Education. *Ibid.* Petitioner's employment by the Ministry of Education coincided with a significant increase in hostilities between the Algerian government and Islamic militants seeking to overthrow the government. *Ibid.* The Algerian government subsequently recalled to military service petitioner and all other persons who had served in the military between 1989 and 1994. *Id.* at 11-12.

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[2] IIRIRA substantially revised the INA's withholding-of-deportation provisions, see IIRIRA, Div. C, Tit. III, Subtit. A, § 305(a)(3), 110 Stat. 3009-602, which are now codified at 8 U.S.C. 1231(b)(3) (Supp. IV 1998). IIRIRA does not govern the present case because its provisions apply only to applications for withholding of deportation filed by aliens who are placed in proceedings on or after April 1, 1997. IIRIRA, § 309(a), 110 Stat. 3009-625. AEDPA's changes in the withholding provision (see Pub. L. No. 104-132, Tit. IV, Subtit. B, § 413(f), 110 Stat. 1269) do apply because the Board's final decision was not issued until after AEDPA's date of enactment. See § 413(g), 110 Stat. 1269-1270; see also *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1443 (1999). The AEDPA amendments, however, are not pertinent to petitioner's claim.

Rather than comply with the military recall, petitioner fled to the United States where he entered in October 1995 without inspection by an immigration official. Pet. App. 9. The Immigration and Naturalization Service (INS) subsequently commenced deportation proceedings against petitioner. *Ibid.*; see also 8 U.S.C. 1251(a)(1)(C)(i) (1994). Petitioner conceded deportability, but sought asylum and withholding of deportation based on his fear of punishment by the Algerian government for his resistance to military service. Petitioner explained that he did not want to have to fight against his fellow citizens, but that he also feared that his failure to report for military duty could result in imprisonment for up to 15 years. Pet. App. 6, 11. Petitioner further argued that military service would require him to engage in conduct that would violate international human rights standards. *Id.* at 6.

3. The immigration judge denied petitioner's application for withholding of deportation and asylum, but granted him voluntary departure. Pet. App. 9-14. The immigration judge found that petitioner presented "no evidence" that the punishment he faced for avoiding military service was "in any way different from any other persons" who had been recalled, and thus did not create the requisite risk of persecution on the basis of his race, religion, nationality, political opinion, or membership in a particular social group. *Id.* at 12. The immigration judge further found that petitioner's desire not to fight against his fellow Algerians did not transform the government's punishment of his resistance into persecution on the basis of political opinion or another protected characteristic. *Id.* at 13.

The Board of Immigration Appeals affirmed. Pet. App. 5-8. The Board found "no support" for petitioner's contentions either that he would face 10 to 15 years in

jail and a possible death sentence for his resistance to military service or that a disproportionate punishment would be imposed because of petitioner's political opinions or any other protected characteristic. *Id.* at 6. The Board also rejected petitioner's claim that he should be granted relief because he would be forced to engage in inhumane conduct. The Board explained that petitioner's evidence showed only that some government forces engage in abuses, not that he "would be required to engage in such actions as a member of the armed forces" or that such abuses were condoned or encouraged by the Algerian government. *Id.* at 6-7. The Board also noted that the Algerian government has not been condemned by international governmental bodies for such conduct. *Id.* at 7.

4. The court of appeals affirmed. Pet. App. 1-2. The court concluded that substantial evidence supports the Board's decision that petitioner is ineligible for withholding of deportation or asylum based on his resistance to military service. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 12-17) that the court of appeals erred in sustaining the Board's requirement that, in order to demonstrate that military service would entail engaging in human rights violations, petitioner must show that the commission of atrocities by the military was pursuant to governmental policy. He also argues (*ibid.*) that the Board erred in requiring evidence of condemnation of the Algerian government by "international governmental bodies." Those claims do not merit review.

First, there is no conflict in the circuits. To the contrary, as petitioner notes (Pet. 13), the Board's rules are consistent with the ruling of the en banc Fourth

Circuit in *M.A.* v. *INS*, 899 F.2d 304 (1990). That decision upheld the Board's requirements both of governmental endorsement of inhumane military conduct and of condemnation by the international community, rather than just by private interest groups. *Id.* at 312-313; see also *Barraza Rivera* v. *INS*, 913 F.2d 1443, 1453 & n.14 (9th Cir. 1990) (acknowledging requirement that atrocities committed by military be endorsed by government, and finding it satisfied where individual directly ordered by higher military officials to undertake assassinations).

Second, the Board's requirement that applicants identify not just sporadic instances of military atrocities, but a systematic governmental policy of encouraging or tolerating such practices is appropriate. As the Fourth Circuit explained in *M.A.*:

> Misconduct by renegade military units is almost inevitable during times of war, especially revolutionary war. * * * Without a requirement that the violence be connected with official governmental policy, however, *any* male alien of draft age from just about any country experiencing civil strife could establish a well-founded fear of persecution. The Refugee Act does not reach this broadly.

899 F.2d at 312. That rationale applies with particular force in the present case, where petitioner introduced no evidence that he individually would be compelled to engage in inhumane conduct (Pet. App. 7) and where petitioner previously served in the military for two years without incident.

The Board's reluctance to accord significant weight to reports of human rights violations by private groups was also proper. Again, as the Fourth Circuit explained in *M.A.*:

> We are also uncertain of the criteria by which courts would analyze the reports of private groups. Presumably, if any private organization condemns the acts of some members of the military in a country at war, these condemnations would serve as the basis for asylum eligibility. Although we do not wish to disparage the work of private investigative bodies in exposing inhumane practices, these organizations may have their own agendas and concerns, and their condemnations are virtually omnipresent.

899 F.2d at 313. Indeed, the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (rev. ed. Jan. 1992) (UNHCR Handbook), also requires that the government's violence must be "condemned by the international community," *id.* at para. 171, and not just by private entities.[3]

The Board's determination of whether and how the compelled commission of atrocities by military units will establish persecution by the government on the basis of a prohibited factor, moreover, merits substantial deference. See *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1445-1446 (1999).[4]

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[3] See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (UNHCR Handbook can provide "significant guidance" in construing the INA's provisions); cf. *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1447 (1999).

[4] Petitioner contends (Pet. 15) that, even if the Board's approach is correct in "a 'normal' case," a different rule should apply when "the government in question has no legitimate claim to power." The Board explained in its opinion (Pet. App. 7), however, that it found factually inapplicable to petitioner's case those decisions dealing with punishments imposed by governments that are not "legitimate and internationally recognized." In particular, the

Third, the Board's decision, which the court of appeals affirmed, did not turn solely upon petitioner's lack of evidence of a governmental policy endorsing atrocities or of international condemnation of the Algerian government. In addition to those findings, the Board ruled, in the alternative, that petitioner failed to show that he "would be required to engage in such [inhumane] actions as a member of the armed forces." Pet. App. 7. Petitioner does not contend that the Board's identification of this alternative deficiency in his evidence represented legal error. Thus, even were this Court to disagree with the Board's interpretation of the relevant provisions of the INA, the ruling would be of no assistance to petitioner because of his inability to demonstrate that he would be persecuted by the Algerian government for refusal to engage in internationally condemned conduct, rather than simply punished for draft resistance.

Board found petitioner's analogy to cases involving Afghani refugees inapt because, in those cases, the Board found that the Afghan government and military were under the complete control of a foreign government (the Soviet Union), and the government sought to punish individuals not just for draft resistance, but also for their active support of a group that sought to overthrow the government, and thus sought to persecute them on the basis of political opinion. See Pet. App. 7 (describing decision in *In re Izatula*, 20 I. & N. Dec. 149 (1990); see also *In re Salim*, 18 I. & N. Dec. 311, 312 (1982) (draft resistor was also a former member of the Mujahidin rebels). Petitioner makes no claim that he has supported the Islamic opposition to the Algerian government, that the Algerian government seeks to persecute him on that basis, or that the Algerian government for which petitioner worked for the five years immediately preceding his departure to the United States lacks all trace of domestic legitimacy because it is under the domination of a foreign power.

Finally, petitioner argues (Pet. 10-11) that review is warranted because the court of appeals summarily disposed of his arguments under the substantial evidence standard, without discussing his other legal challenges in its opinion. As explained, however, that substantial evidence disposition was appropriate because petitioner's legal challenges address alternative rulings of the Board. The Board's determination that petitioner presented no evidence that he would personally be compelled to engage in inhumane conduct provided an independent and sufficient basis for disposing of his claims, and petitioner has challenged that aspect of the Board's ruling only on substantial evidence grounds. See Pet. C.A. Br. 15.

In any event, because this Court reviews judgments and not opinions, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), and the court of appeals' judgment was correct, petitioner's objection to the content of the court of appeals' opinion presents no broad issue of enduring importance and thus does not merit an exercise of this Court's certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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